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No. 84-1397

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
THOMAS H. PACHECO
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States Claims Court abused its discretion by denying petitioner's motion for leave to file notice of appeal outside of the time limit fixed by Fed. R. App. P. 4(a)(1) where the Claims Court determined that failure to allow sufficient time for mail delivery of the notice of appeal did not constitute "excusable neglect" within the meaning of the Rule 4(a)(5).

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OPINION BELOW

The judgment order of the court of appeals (App., *infra*, 1a) is unreported. The opinion of the Claims Court (Pet. App. 37-40) is reported at 5 Cl. Ct. 745 (1984).

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1984. The petition for a writ of certiorari was filed on March 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. Claims Court Rule 72 provides:

> Review of a decision of this court shall be obtained by filing a notice of appeal with the clerk within the time and manner prescribed for appeals to United

States courts of appeals from United States district courts.

2. Rule 4, Fed. R. App. P., provides in pertinent part:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. * * *

* * * * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

STATEMENT

1. Petitioner filed an action in the United States District Court for the Western District of Washington, claiming, inter alia, that its members' fishing rights had been taken without just compensation as a result of the decision in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert.

denied, 423 U.S. 1086 (1976). The district court entered summary judgment in the government's favor on all of petitioner's claims. Pet. App. 57-66. The United States Court of Appeals for the Ninth Circuit affirmed as to all claims except the taking claim (Pet. App. 50-56). Because petitioner sought monetary damages in excess of $10,000 on the taking claim, the court of appeals "reluctantly" concluded that exclusive jurisdiction over the claim was in the Claims Court and that it was required to remand that count to the district court for possible transfer to the Claims Court pursuant to 28 U.S.C. 1406(c) (Pet. App. 52-54). The district court subsequently transferred the taking claim to the Claims Court (Pet. App. 48-49), where, on the government's motion, the claim was dismissed by judgment entered on May 3, 1984 (Pet. App. 41-47). Although the Claims Court dismissed on the basis of the statute of limitations and the Assignment of Claims Act, 31 U.S.C. 3727(a) (Pet. App. 41-46), it noted its view that the taking claim was wholly nonmeritorious (*id.* at 46).

2. Petitioner's notice of appeal to the United States Court of Appeals for the Federal Circuit from the May 3, 1984 judgment of the Claims Court was received by the clerk of the Claims Court on July 3, 1984, 61 days after entry of the judgment and one day after the 60-day period for filing provided by Fed. R. App. P. 4(a)(1). Petitioner mailed the notice from Anacortes, Washington, to Washington, D.C., on June 28, 1984, five days before it was due to be received by the Claims Court clerk's office, using regular United States mail service (Pet. App. 39). Because the notice was untimely filed, it was rejected by the clerk and returned to petitioner.

Petitioner thereupon sought a nunc pro tunc extension of time for filing a notice of appeal under Fed. R. App. P. 4(a)(5) so as to validate its prior tardy filing. The Claims Court denied the motion for an extension, on the ground

that petitioner had not made the showing of "excusable neglect" required by Fed. R. App. P. 4(a)(5) (Pet. App. 37-40). Petitioner noticed a timely appeal to the Federal Circuit from the denial of the extension motion, and filed briefs in the court of appeals challenging both the denial of the extension and the Claim Court's adverse ruling on the taking claim. The government filed a motion to dismiss petitioner's appeal, citing the untimeliness of his notice of appeal from the Claims Court's May 3, 1984 judgment and the subsequent denial of petitioner's motion for extension of time to file that notice of appeal. The Federal Circuit granted the United States' motion and dismissed the appeal by judgment order (App., *infra*, 1a).

ARGUMENT

The denial of petitioner's motion to file a notice of appeal out of time was not an abuse of discretion and plainly does not raise any question meriting this Court's review.

1. a. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that a notice of appeal in a civil case to which the United States or a federal officer or agency is a party must be filed within 60 days of entry of judgment. A notice of appeal is filed when received by the clerk of the court, and is not deemed filed upon mailing. See, *e.g.*, *Pryor* v. *Marshall*, 711 F.2d 63, 65 (6th Cir. 1983); *Sanchez* v. *Board of Regents of Texas Southern University*, 625 F.2d 521, 522 (5th Cir. 1980); *Allen* v. *Schnuckle*, 253 F.2d 195, 197 (9th Cir. 1958).[1] The time limit established by Fed. R. App. P. 4(a)(1) for filing of a notice of appeal is generally "mandatory and jurisdictional" and must therefore be strictly observed. *Browder* v. *Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*,

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[1]Petitioner does not dispute this proposition. See Pet. 25.

361 U.S. 220, 229 (1960); 16 Wright & Miller, *Federal Practice and Procedure* § 3950, at 361 (1977).[2]

Pursuant to Fed. R. App. P. 4(a)(5), however, the Claims Court has authority to extend the time for filing the notice upon a showing of "excusable neglect."[3] The Claims Court properly determined (Pet. App. 37-40), however, that petitioner's failure to file a timely notice was not due to excusable neglect. This exercise of the Claims Court's discretion is not open to "second guessing" at the appellate level, and thus must be sustained absent a "clear abuse of discretion." *Benoist* v. *Brotherhood of Locomotive Engineers*, 555 F.2d 671, 672 n.1 (8th Cir. 1977); see, *e.g.*, *United States* v. *Myers*, 692 F.2d 861 (2d Cir. 1982).

A party's failure to learn of the entry of judgment generally provides the basis for a finding of excusable neglect. See 16 Wright & Miller, *supra*, at 366-367; *Dugan* v. *Missouri Neon & Plastic Advertising Co.*, 472 F.2d 944, 948 (8th Cir. 1973). Petitioner does not claim that it failed to receive timely notice of the judgment, however, and no other circumstance supports a finding of excusable neglect in this case. Contrary to petitioner's assertion (Pet. 27), petitioner's counsel did not do "everything within their power" to assure timely filing of the notice. Although petitioner was allowed 60 days from the date of judgment in which to appeal, it waited until five days before the notice was due to

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[2]Claims Court Rule 72 confirms that the time limits of Fed. R. App. P. 4(a)(1) govern appeals from the Claims Court to the Federal Circuit.

[3]As amended in 1979 Rule, 4(a)(5) also permits the Claims Court to grant an extension if "good cause" is demonstrated. Petitioner relies solely upon the excusable neglect branch of the Rule, however. In any event, the advisory committee notes accompanying in the 1979 Amendment make clear that the good cause standard is intended to be applied only when the motion is filed before expiration of the time period prescribed by Rule 4(a)(1). 28 U.S.C. App., at 469-470.

be received in Washington, D.C. to mail its notice of appeal. The preparation of a one-page notice of appeal could not have required much time.[4] There accordingly was no sufficient justification for petitioner's failure to act more promptly. Moreover, petitioner admits mailing the notice from its offices in the State of Washington to Washington, D.C., by regular mail, even though it is commonly known that next-day and express delivery services are available for just such situations, and petitioner does not allege that such services were unavailable to it. As the Claims Court found (Pet. App. 39), petitioner simply took the risk that its mailing would be received on the other side of the continent too late for filing.

This is not a case where the untimeliness of the filing was attributable to factors outside of counsel's control, such as *Aldabe* v. *Aldabe*, 616 F.2d 1089, 1091 (9th Cir. 1980), where the notice was timely received by the clerk, but was not formally filed for another two weeks. Rather, this case is similar to other instances in which appeals have been held barred because of avoidable failures to file timely notices. See, *e.g.*, *Meza* v. *Washington State Dep't of Social and Health Services*, 683 F.2d 314 (9th Cir. 1982) (counsel's wife was hospitalized two days before notice was due, but no explanation was given as to why the notice had not been filed sooner, or why other attorneys in the same office could not have attended to the filing); *Airline Pilots in Service of Executive Airlines, Inc.* v. *Executive Airlines, Inc.*, 569 F.2d 1174 (1st Cir. 1978) (counsel's secretary mistakenly noted due date for filing notice); *Fase* v. *Seafarers Welfare*

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[4] A simple form for a notice of appeal is included in the Appendix of Forms to the Rules of Appellate Procedure. 28 U.S.C. App., at 497.

& Pension Plan, 574 F.2d 72 (2d Cir. 1978) (counsel mistakenly relied on practice of other district courts of sending notice of entry of judgment to counsel, and court did not send notice).[5]

b. Without explanation, petitioner cites (Pet. 28) this Court's decision in *Fallen* v. *United States*, 378 U.S. 139 (1964). *Fallen* provides no support for petitioner's contentions. In *Fallen* the Court held timely a prisoner's appeal from a criminal conviction received out of time by the district court clerk where the government conceded that the notice of appeal had been timely delivered to prison authorities for mailing, and where absent irregular collection of mail from the penitentiary, Fallen's notice of appeal would have been timely received by the clerk of the court. The Court concluded that the "record facts" established that Fallen had "done all that could reasonably be expected" to notice his appeal in a timely fashion. 378 U.S. at 144.

This case bears no resemblance to *Fallen*. First, there was no issue in that case as to whether time for filing an appeal should have been extended. Indeed, at the time *Fallen* was decided no authority existed for such an extension in a criminal case. See *United States* v. *Robinson, supra.* Second, the circumstances that dictated relaxation of the jurisdictional character of the filing requirement are absent here. As explained above, petitioner here did not take the steps that reasonably could be expected, especially of a party represented by counsel, to assure timely receipt of his notice of appeal. Moreover, petitioner has presented no information that suggests that unforeseeable delays in the transmission of the mail occurred in this case.[6]

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[5]Indeed, in each of the three cases cited in the text, the court of appeals found that the district court had abused its discretion in finding excusable neglect and permitting the late filing of a notice of appeal.

[6]Petitioner's reliance (Pet. 27-28) on language in *Sanchez* v. *Board of Regents*, 625 F.2d at 522, accordingly is unwarranted.

2. Petitioner argues (Pet. 28-32) further that the "interests of justice" require that its failure to file a timely notice of appeal be excused and that its claim be considered on its merits. However, because of the mandatory and jurisdictional character of the time limit for taking the appeal, the merits of petitioner's claim are essentially irrelevant to whether the Claims Court abused its discretion in denying the motion to extend. In any event, the interests of justice plainly are not disserved by the dismissal of petitioner's appeal. Petitioner claims that the decision in *United States* v. *Washington, supra,* deprived its members of "valuable property rights," because those decisions held that the Indians in Washington had a treaty right to take up to 50% of all harvestable fish at their "usual and accustomed" grounds and stations, and as a result petitioner's members were limited in their fishing activities. To date, the three federal courts which have been confronted with petitioner's taking claim in this case have made clear that it is wholly without merit (see Pet. App. 46-47, 52-53, 60-61). As the Claims Court succinctly stated (Pet. App. 47), the judicial decisions of which petitioner complains

> did not result in the taking of any property of [petitioner's members] in favor of the Indians; they merely refined the interpretation of the treaties which had long been foretold. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. [658,] at 679, 685 [(1979)]. If the non-Indian commercial fishermen earlier had larger harvests of fish, it was because they had enjoyed a share of the catch belonging to the Indians by treaties. The reordering of entitlement between Indian and non-Indian commercial fishermen in accordance with the treaties

cannot be considered a taking from the non-Indians, but a righting of the balance the treaties required.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
THOMAS H. PACHECO
Attorneys

MAY 1985

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[7]We note, as well, that petitioner does not identify any error in the Claims Court's conclusion (Pet. App. 41-46) that petitioner's taking claim is barred by the statute of limitations and the Assignment of Claims Act, 31 U.S.C. 3727(a).

DOJ-1985-05

APPENDIX

United States Court of Appeals for the Federal Circuit

No. 84-1778
51-83C

NORTHWEST COMMERICAL FISHERMAN'S FEDERAL RECOVERY ASSOCIATION, ETC.,
Appellant,

v.

THE UNITED STATES, Appellee.

Judgment

ON APPEAL from the U.S. Claims Court

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: DISMISSED, on Appellee's Motion to Dismiss.

DATED December 12, 1984 *ENTERED BY ORDER OF THE COURT*

George E. Hutchinson, Clerk

Clerk

ISSUED AS A MANDATE: February 4, 1985